Supreme Court, U.S.
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No. 03-1689

In The
Supreme Court of the United States

ELLIOT ROTHENBERG,

Petitioner,

v.

BOARD OF CONTINUING LEGAL EDUCATION,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court's rule requiring attorneys licensed in the State of Minnesota to complete continuing legal education dealing with the elimination of bias violates the Freedom of Speech Clause of the First Amendment.

2. Whether Respondent's approval of coursework such as "Understanding Islam" violates the First Amendment Establishment Clause.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Minnesota Board of Continuing Legal Education respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 676 N.W.2d 283 (Minn. 2004) and is reproduced in Petitioner's Appendix at A-1.

JURISDICTIONAL STATEMENT

Respondent issued an order on June 23, 2003, finding Petitioner in noncompliance with the requirement he complete elimination of bias coursework. The Supreme Court reviewed the order and the constitutional issues raised by Petitioner and issued its opinion on March 25, 2004. The Petition for Writ of Certiorari was docketed in this Court on June 24, 2004.

RELEVANT AUTHORITY INVOLVED

Petitioner lists the Establishment and Freedom of Speech Clauses of the First Amendment to the Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution, U.S. Const. Amend. I and XIV as relevant authority. However, Petitioner did not raise a due process objection before the Minnesota Supreme Court as a basis for declining to place him on involuntary restricted status.

STATEMENT OF THE CASE

This case presents First Amendment challenges to the Minnesota Supreme Court rule requiring attorneys admitted to the Minnesota Bar to complete continuing legal education (CLE) coursework in the elimination of bias. Elimination of bias coursework, by definition, includes courses that are directly related to the practice of law and designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation. Rule Minn. Bd. of CLE 2I.

A. Regulatory Authority of the Minnesota Supreme Court.

The judicial power of the State of Minnesota is vested in the Minnesota Supreme Court. Minn. Const. art. VI, § 1. The legislature has given the court authority to regulate the legal profession in the State of Minnesota, including prescribing rules governing the examination and admission to practice of attorneys at law and rules governing their conduct in the practice of their profession. The authority to set the continuing legal education requirements for attorneys has also been vested in the court. Minn. Stat. § 480.05 (2002). The court has delegated the responsibility for administering certain of its rules to various appointed boards. Respondent CLE Board is the court's delegated supervisory agency for the administration of the court-approved CLE rules. Rule Minn. Bd. of CLE 3D.

B. Enactment of the Elimination of Bias CLE Rules.

By order dated September 15, 1995, the Minnesota Supreme Court mandated that attorneys licensed by the State of Minnesota must accrue at least three hours of continuing legal education courses in legal ethics and professional responsibility and at least two hours in courses on the elimination of bias in the legal profession and in the practice of law. The five "ethics and bias" credit hours were included in the already existing 45-hour attorney continuing legal education requirement.

In 1996, the Minnesota Supreme Court amended Respondent's Rules to include the following provisions for the elimination of bias course work:

> Course in the elimination of bias in the legal profession and in the practice of law means a course directly related to the practice of law that is designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law, biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.

Rule Minn. Bd. of CLE 2I.

> Elimination of Bias Courses. Courses or sessions within courses accredited as elimination of bias:
>
> (1) Must be at least sixty (60) minutes in length;
>
> (2) Must be identified on the Course Approval Form as fulfilling the elimination of bias requirement and be accompanied by a narrative required by Appendix I of these Rules;

(3) Must focus on issues in the legal profession and in the practice of law and not upon issues of bias in society in general; and

(4) Must not include courses on the substantive law of illegal discrimination unless such courses meet one or more of the Goals for the Elimination of Bias as set forth in the Course Approval Form at Appendix I.

Rule Minn. Bd. of CLE 6B.

Courses approved as "elimination of bias" must be at least 60 **continuous minutes in duration**, must be directly related to the practice of law, must meet all other requirements of Rule 5 of the Rules of the CLE Board and must be designed to meet one or more of the following goals:

1. to educate attorneys about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or in the administration of justice;

2. to educate attorneys regarding barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and those persons referenced in the **"elimination of bias" definition** Rule 2I of the Rules of the CLE Board, both in the public and private sector of the legal profession and in the practice of law;

3. to educate attorneys about the problems identified in the Supreme Court's Race Bias and Gender Fairness Task Force Reports, as well as in other studies, reports or treatises which describe bias and prejudice in the legal profession, in the practice of law, and/or in the administration of justice.

Appendix I, Course Approval Form, Rule Minn. Bd. of CLE Learning Goals for Minnesota Elimination of Bias Courses.

> To maintain active status, a lawyer must submit a written affidavit to the Board on the affidavit form published as Appendix II and incorporated herein, setting forth all information called for and showing that the lawyer has completed a minimum of 45 hours of course work either as a participant or a presenter in approved continuing legal education courses, including:
>
> (1) no fewer than three (3) hours of courses on ethics and professional responsibility education; and
>
> (2) no fewer than two (2) hours of courses in the elimination of bias in the legal profession and in the practice of law.

Rule Minn. Bd. of CLE 9A.

C. June 2003 Evidentiary Hearing.

Petitioner did not complete the required coursework in the elimination of bias for the 1999 to 2002 reporting period. At a one-day hearing on June 19, 2003, Petitioner defended his noncompliance by asserting the requirement violates the First Amendment Freedom of Speech and Freedom of Conscience Clauses. Petitioner challenged the requirement by voicing disapproval of the May 1993 Minnesota Supreme Court Task Force on Racial Bias in the Judicial System report and the content of certain of the courses offered to satisfy the elimination of bias requirement. Pet'r Br. at 2-5.

In addition to his free speech challenges, Petitioner claimed some of the courses approved by Respondent promoted and endorsed one religion to the exclusion of others in violation of the Establishment Clause of the First Amendment. Specifically, Petitioner claimed many courses that have been offered provided a sanitized and one-sided presentation of Islam to the exclusion of any courses on antisemitism for which Minnesota has been notorious.

Respondent found Petitioner in noncompliance with Rule 9A(2) but did not rule on the constitutional issues. Respondent recommended that Petitioner's license to practice law in Minnesota be placed on involuntary restricted status unless Respondent filed a Petition for Review with the Minnesota Supreme Court.

D. State Court Appeal.

Petitioner sought review of Respondent's decision from the Minnesota Supreme Court, which granted review. On March 24, 2004, in a unanimous decision, the Minnesota court rejected Petitioner's argument that requiring attorneys to attend elimination of bias courses violates their First Amendment free speech or freedom of conscience rights or the First Amendment Establishment Clause. The court ordered Petitioner to attend two hours of elimination of bias classes by July 1, 2004, or have his license placed on involuntary restricted status. Pet'r App. at 19.

Addressing Petitioner's multifaceted First Amendment challenges, the Minnesota Supreme Court held that Petitioner's compelled speech and freedom of conscience arguments failed because he submitted no evidence that he was forced to pay for courses discussing ideological or

political ideas that he opposes. Pet'r App. at 8-15. Likewise, the court found Petitioner presented no evidence that Respondent's approval of certain continuing legal education courses that include a discussion of religion have the primary effect of advancing or inhibiting religion in violation of the Establishment Clause. *Id.* at 15-18.

The court also rejected Petitioner's assertion that Respondent's approval of courses promoting an understanding of Islamic culture violated the Freedom of Conscience Clause of the Minnesota Constitution. The court observed that although those courses did include discussion of the religious tenets and values of Islam, Petitioner had numerous choices of courses to meet the elimination of bias requirement and he made no showing that he had no choice but to violate his freedom of conscience. *Id.* at 17-18.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari for several reasons. First, the decision of the Minnesota Supreme Court does not conflict with any decision of this Court. Rather, the allegedly conflicting cases cited by Petitioner are fundamentally different from this case. Second, the Minnesota Supreme Court made clear in its holding, consistent with this Court's decisions, that the constitutionality of the elimination of bias requirement depends on its germaneness to the goals of regulating the legal profession and improving the quality of legal services in Minnesota. Finally, Petitioner's argument that the elimination of bias requirement violates the Establishment

Clause is not supported by the record and does not warrant this Court's review.

I. THE MINNESOTA SUPREME COURT'S HOLDING THAT THE ELIMINATION OF BIAS REQUIREMENT DOES NOT VIOLATE THE FIRST AMENDMENT FREEDOM OF SPEECH CLAUSE DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner asserts that the Minnesota Supreme Court's decision conflicts with this Court's prior decisions applying the First Amendment Freedom of Speech Clause. To the contrary, the Minnesota Supreme Court's decision shows that the court specifically considered the precedents of this Court regarding government interference with individuals' First Amendment freedom of speech right.

The compelled-expression doctrine on which Petitioner relies emanates from the Freedom of Speech Clause. This Court's decisions in "compelled speech" fall into two discrete categories: those where the government directly or indirectly compels citizens to engage in speech activity and those that compel people to join and contribute to groups or associations whose speech they find objectionable. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (government may not compel children, contrary to their conscience, to salute the American flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (government may not compel motorists, contrary to their conscience, to display license plates bearing the motto "Live Free or Die"); and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that the state bar, in which membership was required as a condition of practicing law in the state, could not spend dues on certain ideological and political activities to which

individual dues payers were opposed). Petitioner argues this case falls in the latter category.

In addressing Petitioner's freedom of speech compelled-expression claim, the Minnesota court relied on the "guiding standard" this Court articulated in *Keller*: whether the requirement is "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop v. Donohue,* 367 U.S. 820, 843 (1961)). Pointing to Petitioner's own concession "that there is prejudice and bias in society, that it ought to be combated at every turn, and that lawyers should ensure that their conduct does not hurt anyone and does not deny anyone's rights on the basis of bigotry, prejudice or bias," the court concluded that the elimination of bias requirement "is germane to the goals of regulating the legal profession and improving the quality of legal services in Minnesota." Pet'r App. at 10. The court further stated that there was simply no evidence that Petitioner was required to pay for a course discussing ideological or political ideas that he opposes. *Id.* Rather, "there are hundreds of courses offered to which he has not voiced any objection." *Id.*

A. Passive Exposure To Elimination Of Bias Coursework Does Not Violate Petitioner's Freedom of Speech Rights.

Petitioner challenges the Minnesota Supreme Court's ruling by citing three cases heard by this Court as examples of what he describes as "sixty years of compelled speech decisions of this Court." Pet'r Br. at 7. However, the cases cited by Petitioner are limited to the facts under which they were decided and there is overwhelming

authority that supports the Minnesota court's holding that First Amendment rights are not violated by a requirement that Petitioner be merely passively exposed to elimination of bias coursework since he is not compelled to manifest any agreement or allegiance to the goals or political agendas of the presenters. *See, e.g., Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262-265 (1934) (required training courses in military science and tactics did not violate First Amendment rights of conscientious objectors to violence); *Barnette*, 319 U.S. 624, 631-632 (students may not be required to salute the American flag with a Hitler-style stiff-arm salute, but they may be required to attend civics classes relating to political subjects, including the symbolism of the flag); *Chaney v. State Bar of Cal.*, 386 F.2d 962, 964 (9th Cir.1967) (applicants to be California lawyers may constitutionally be required to demonstrate familiarity with certain legal concepts, including essay questions on "legal philosophy," even though they might not be required to manifest allegiance to any particular legal philosophy); *Tennison v. Paulus*, 144 F.3d 1285, 1287 (9th Cir.1998) (no First Amendment violation to require students to attend classes in fashionable subjects, despite claims that this interfered with certain students' "freedom of mind"); *Greenberg v. State Bar*, 92 Cal. Rptr. 2d 493, 496 (Cal. Ct. App. 2000), *review denied* (Cal. Apr. 26, 2000) (finding no constitutional infringement where plaintiffs were merely passively exposed to classes relating to substance abuse, emotional distress, and elimination of bias, without being compelled to manifest any agreement or allegiance to their goals or other political agendas) (citing *Hamilton*, 293 U.S. 245).

B. The Minnesota Supreme Court Correctly Applied The *Keller* Germaneness Test.

Petitioner next challenges the Minnesota court's reliance on *Keller*, contending that the court's holding that Respondent's curriculum met the *Keller* test "should not be sufficient by itself." Petitioner claims "[a]s in *Keller*, this Court should apply an objective standard of strict scrutiny to insure state compliance with constitutional protections against compelled speech." Pet'r Br. at 8. Petitioner misstates the *Keller* test. As stated by the Minnesota Supreme Court, this Court in *Keller* applied an intermediate level of scrutiny, requiring more than a rational relationship but less than a narrowly tailored service of a compelling state interest. *Keller,* 496 U.S. 1, 14; *see also Glickman v. Wileman Bros. & Elliott, Inc.* 521 U.S. 457, 473-74 (1997) (applying the *Keller* germaneness standard and implicitly rejecting the applicability of strict scrutiny analysis in the case before the Court); *Greenberg*, 92 Cal. Rptr. 2d 493 (applying *Keller* and upholding the California bar's elimination of bias requirement).

The Minnesota court appropriately applied the *Keller* germaneness standard verbatim and found that Petitioner failed to show his First Amendment interests outweigh the court's legitimate interest in raising the quality of professional service provided by members of the Minnesota Bar. The legitimacy of Respondent's interests are confirmed by the history of the CLE rules: that is, in ordering the elimination of bias coursework and in drafting and promulgating the rules to implement the order, the Minnesota Supreme Court and Respondent relied on studies about discriminatory practices that impact the legal profession in Minnesota. *See* BENCH AND BAR OF MINNESOTA, Nov. 1995, at 32 (Order C2-84-2163; Sept. 15, 1995); *Minnesota*

Supreme Court Task Force for Gender Fairness in the Courts, 15 Wm. Mitchell L. Rev. 827 (1989); *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System,* 16 Hamline L. Rev. 477 (1993). The rules were intended to be sufficiently broad in scope to address the multifaceted issues associated with bias in the legal profession. Learning Goal 3, to educate attorneys about identified problems, is evidence that the court effectuated its intent to allow for a broad range of topics to satisfy the elimination of bias coursework requirement. Appendix I, Course Approval Form, Rule Minn. Bd. of CLE Learning Goals for Minnesota Elimitation of Bias Courses.

C. The Elimination of Bias Coursework Is Not "Ideologic."

Finally, Petitioner challenges the Minnesota court's holding that the coursework is not ideologic, claiming that "ideological advocacy is inevitable for courses whose purpose is not to educate regarding substantive law but to inculcate what are deemed proper attitudes." Pet'r Br. at 8. The state court, in arriving at its holding, correctly found no factual support for Petitioner's argument "that the elimination of bias requirement was designed on an ideologic basis or that Respondent has approved courses on an ideological basis." Pet'r App. at 13. Likewise, the court found no support for Petitioner's inculcation argument. Rather, the court observed that courses such as "Understanding Deaf Culture and Working with Deaf Clients" exemplified appropriate efforts "to change behavior by informing lawyers how to identify and eliminate bias." Pet'r Br. at 14.

The Minnesota Supreme Court's holding is supported by federal law and decisions of this Court that recognize the correctness of attempting to eradicate discriminatory behavior. *See* 42 U.S.C. §§ 12181(7)(F), 12182(a) (2002) (prohibiting disability discrimination in the full and equal enjoyment of services, including legal services); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (state has a compelling interest in eliminating discrimination against women that justifies the impact that the Human Rights Act may have on male members' associational freedoms).

D. The Government Speech Doctrine Is Not Properly Before This Court.

As an afterthought, Petitioner suggests the Court may want to hear this case in conjunction with *Veneman v. Livestock Mktg. Ass'n,* No. 03-1164, to clarify the law regarding government speech and compelled private speech. Pet'r Br. at 9. If the government speech doctrine is applied to Respondent, Respondent would have greater discretion in requiring attorneys to participate in continuing legal education coursework. *Keller*, 496 U.S. at 10-11 (the government may speak despite citizen disagreement with the content of the message); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (the government may fund viewpoint-based speech when the government itself is the speaker and also use private speakers to disseminate specific messages pertaining to government programs). However, this issue was not raised below or addressed by the Minnesota Supreme Court and it is not an issue now properly before this Court on appeal. *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (expressly refraining from deciding whether a generic advertising program involved government speech because

that issue was not raised or addressed in the court of appeals).

II. THE MINNESOTA SUPREME COURT'S DECISION THAT RESPONDENT'S APPROVAL OF COURSEWORK SUCH AS "UNDERSTANDING ISLAM" IS CONSISTENT WITH THE TEST ARTICULATED BY THIS COURT IN *LEMON v. KURTZMAN.*

Petitioner boldly asserts Respondent has endorsed one religion (Islam) over another, thus violating the Establishment Clause. Pet'r Br. at 10-11. The standard for conducting an Establishment Clause analysis is the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion and the statute must not foster an excessive government entanglement with religion). The Minnesota Supreme Court, applying the test articulated in *Lemon*, concluded the first prong was not at issue because Petitioner apparently agreed that the challenged rules do have a secular purpose. Pet'r App. at 15. The court then applied the remaining two prongs of the *Lemon* test, and consistent with holdings of this Court, found that although Respondent had approved certain courses "that include a discussion of religion in the context of eliminating bias in the legal profession and in the practice of law" the rule did not advance or inhibit religion and therefore does not violate the Establishment Clause. Pet'r App. at 17. Given the facts presented – a handful of courses that were offered post September 11, 2001, about understanding Islam –

there is no misapplication of the law or important issue to justify review by this Court.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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